

Testimony of
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Statement of Harold Hongju Koh
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Yale Law School
before the Senate Judiciary Committee
regarding
The Nomination of the Honorable Alberto R. Gonzales
as Attorney General of the United States
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Thank you, Mr. Chairman and Members of the Committee, for inviting me today.

I am the Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at Yale Law School, where I have taught since 1985 in the areas of international law, the law of U.S. foreign relations, and international human rights. I have twice served in the United States government: during the Reagan Administration between 1983-85, as an Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice, and during the Clinton Administration between 1998-2001, as Assistant Secretary of State for Democracy, Human Rights and Labor.

I do not appear today to advise you on how to vote regarding this nomination. Your decision as to whether this candidate deserves confirmation as Attorney General ultimately turns on many factors about which you Senators are more expert than I. Your decision may also involve qualifications and positions of Mr. Gonzales that I have neither reviewed nor researched.

I appear today solely to comment upon Mr. Gonzales' positions regarding three issues on which I have both legal expertise and government experience: the illegality of torture and cruel, inhuman and degrading treatment, the scope of the President's constitutional powers to authorize torture and cruel treatment by U.S. officials, and the applicability of the Geneva Conventions on the Laws of War to alleged combatants held in U.S. custody.

With respect to these three issues, my professional opinion is that United States law and policy have been clear and unambiguous. Torture and cruel, inhuman and degrading treatment are both illegal and totally abhorrent to our values and constitutional traditions. No constitutional authority licenses the President to authorize the torture and cruel treatment of prisoners, even when he acts as Commander-in-Chief. Finally, the U.S. has long recognized the broad applicability of the Geneva Conventions, which is a critical safeguard for our own troops now serving in more than 130 countries around the world. These legal standards apply to all alleged combatants held in U.S. custody.

These are legal principles of the highest significance in American life. To be true to the oath of his office, the Attorney General must swear to uphold the Constitution and laws of the United States of America. He must be committed to enforcing strictly the laws banning torture and cruel treatment. He must observe ratified treaties banning torture and requiring humane treatment of prisoners, and he must ensure that the President abides by the constitutional principle of separation of powers. Most fundamentally, the Attorney General must assure that no one is above the law--even the President of the United States--and that no person is outside the law, whether that person is deemed an "enemy combatant," or held outside the United States or on Guantanamo.

As Americans, we are unalterably committed to the rule of law and the notion that every person has certain inalienable rights. Mr. Gonzales' record and public statements could be read to suggest: first, that the extraordinary threats that we face in the war on terrorism somehow require that the President act above the law, and second, that those who are deemed "enemy combatants" or are held on Guantanamo live outside the protections of the Convention Against Torture and the Geneva Conventions as "rights-free persons" in "rights-free zones."

As Attorney General, Mr. Gonzales must ensure that no person is above the law and that no person is outside the law. His positions on these important issues are thus highly relevant to his fitness to serve as Attorney General.

I. The Illegality of Torture and Cruel Treatment

Article 5 of the Universal Declaration of Human Rights states unequivocally that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In 1994, the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states in Article 2 that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." While serving as Assistant Secretary for Democracy, Human Rights, and Labor in 2000, I stated, upon presenting the United States' first report on its compliance with the Convention Against Torture to the United Nations in Geneva, that "as a country we are unalterably committed to a world without torture."

This remains the announced policy of this Administration. In June of last year, President Bush reiterated:

"Today ... the United States reaffirms its commitment to the worldwide elimination of torture. . . . Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees."

Despite this unambiguous policy, as the President's chief counsel, Mr. Gonzales apparently requested a number of legal memoranda setting forth the administration's legal framework for conducting the war on terrorism. Of these, the most important is an August 1, 2002 memorandum from Jay S. Bybee of the Office of Legal Counsel (OLC) to Mr. Gonzales regarding coercive interrogation tactics. This opinion was not rescinded until last week, more than two years after it first issued. It is more than fifty pages long and has been summarized repeatedly in the press.

Having worked in both Democratic and Republican administrations, and for more than two years as an attorney in the Office of Legal Counsel itself, I am familiar with how legal opinions like this are sought and drafted. I further sympathize with the tremendous pressures of time and crisis that government lawyers face while drafting such opinions.

Nevertheless, in my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read. The opinion has five obvious failures. First, it asks which coercive interrogation tactics are permissible, never mentioning what President Bush correctly called every

person's "inalienable human right" to be free from torture. The opinion's apparent purpose is to explore how U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held criminally liable. Second, the opinion defines "torture" so narrowly that it flies in the face of the plain meaning of the term. For example, the memorandum would require that the interrogator have the precise objective of inflicting "physical pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." August 1, 2002 OLC Memorandum at 1. Under this absurdly narrow legal definition, many of the heinous acts committed by the Iraqi security services under Saddam Hussein would not be torture. Third, the OLC memorandum grossly overreads the inherent power of the President under the Commander-in-Chief power in Article II of the Constitution, an error I discuss in Part II below.

Fourth, the August 1 memorandum suggests that executive officials can escape prosecution for torture on the ground that "they were carrying out the President's Commander-in-Chief powers." The opinion asserts that this would preclude the application of a valid federal criminal statute "to punish officials for aiding the President in exercising his exclusive constitutional authorities." *Id.* at 35. By adopting the doctrine of "just following orders" as a valid defense, the opinion undermines the very underpinnings of individual criminal responsibility. These principles were set forth in the landmark judgments at Nuremberg, and now embodied in the basic instruments of international criminal law.

Fifth and finally, the August 1 OLC memorandum concludes that, for American officials, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment allows cruel, inhuman, or degrading treatment as permissible U.S. government interrogation tactics. In effect, the opinion gives the Executive Branch a license to dehumanize, degrade, and act cruelly, notwithstanding the Fifth Amendment's rejection of government acts that shock the conscience and the Eighth Amendment's rejection of any "cruel and unusual punishments."

Left unchallenged, such dangerous reasoning could even be used to justify the atrocities at Abu Ghraib. For if U.S. and international law do not forbid cruel, inhuman, and degrading treatment, then lower executive officials would have a license to degrade and dehumanize detainees in their custody, without regard to whether those detainees hold any information of value in the war against terror.

The August 1 OLC memorandum cannot be justified as a case of lawyers doing their job and setting out options for their client. If a client asks a lawyer how to break the law and escape liability, the lawyer's ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act.

In sum, the August 1, 2002 OLC memorandum is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described--as my predecessor Eugene Rostow described the Japanese internment cases--as a "disaster."

One would have expected the Counsel to the President to have immediately repudiated such an opinion. Mr. Gonzales did not. Nor did he send the opinion back to the Office of Legal Counsel to take account of the unambiguous views of the State Department--expressed in the official 1999 U.S. Report on the Convention Against Torture discussed above--or to incorporate the President's unambiguous policy against torture. Instead, the 2002 OLC Opinion was apparently transmitted to the Defense Department, where its key conclusions appear to run through the Defense Department's April 4, 2003 Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations.

In a June 22, 2004 press conference, Mr. Gonzales did not repudiate the opinion, but instead stated that "[u]nnecessary, over-broad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by policymakers are under review, and may be replaced, if appropriate, with more concrete guidance addressing only those issues necessary for legal analysis of actual practice." Another six months then passed before the Office of Legal Counsel, last week, finally repudiated its earlier opinion's overly narrow definition of torture. Thus, the OLC opinion apparently remained the controlling executive branch legal interpretation for nearly two and one-half years. Even now, the Office of Legal Counsel has not yet clearly and specifically renounced the parts of the August 1, 2002 OLC opinion concerning the Commander-in-Chief power, stating that "[c]onsideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." Levin Memorandum, *supra* note 5, at 2.

This reading simply begs the question of whether the President and his subordinates have legal authority to commit torture and cruel treatment--but have chosen not to exercise it--or whether, as I believe, the Constitution, treaties and laws of the United States deny the President and his subordinates that power. Although the new OLC Opinion marks a welcome, if long-delayed, repudiation of the August 1, 2002 OLC Opinion, it still leaves unclear what legal rules constrain U.S. interrogators. Nor is it clear from the written record what Mr. Gonzales' own current views are.

Our nation's chief law enforcement official should not tolerate such ambiguity on a matter so central to our national values. Mr. Gonzales should commit himself, if confirmed as Attorney General, to repudiate all elements of the August 1, 2002 OLC Memorandum and to rigorously enforce all treaties and laws barring torture and cruel, inhuman, and degrading treatment.

II. The President's Inherent Constitutional Powers

As noted above, the August 1, 2002 OLC memorandum grossly overreads the inherent power of the President under the Commander-in-Chief power in Article II of the Constitution. The memorandum claims that criminal prohibitions against torture do "not appl[y] to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority," *id.* at 35. Yet the Eighth Amendment does not say "nor [shall] cruel and unusual punishments [be] inflicted" except when the Commander-in-Chief orders, and the Fifth Amendment's Due Process Clause nowhere sanctions executive torture.

As remarkably, the August 1 memorandum declares that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." August 1, 2002 OLC Memorandum at 39. But if the President has the sole constitutional authority to sanction torture, and Congress has no power to interfere, it is unclear why the President should not also have unfettered authority to license genocide or other violations of fundamental human rights. In a stunning failure of lawyerly craft, the August 1, 2002 OLC Memorandum nowhere mentions the landmark Supreme Court decision in *Youngstown Steel & Tube Co. v. Sawyer*, where Justice Jackson's concurrence spelled out clear limits on the President's constitutional powers.

Under these parts of the August 1, 2002 OLC memorandum (which unlike the narrow torture definition have not been formally replaced), the President would have constitutional power to ignore the criminal prohibition against torture in 18 U.S.C. § 2340-40A, or to flout the recent Defense Authorization Act, which states that "[i]t is the policy of the United States to-- (1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." Moreover, this reading of the President's Commander-in-Chief power would even allow him to order subordinates to trump Congress' power under Article I, section 8, clause 10 to "define and punish ... offences against the law of nations" such as torture.

This sweeping view of the President's powers to conduct the war on terror has not been confined to the area of torture. In a recently unearthed OLC memorandum to Mr. Gonzales' office, dated two weeks after September 11, then-Deputy Assistant Attorney General John C. Yoo asserted that "[t]he historical record demonstrates that the power to initiate military hostilities, particularly in response to the threat of an armed attack, rests exclusively with the President." This remarkably overbroad assertion not only ignores Congress' power "to declare war," Art. I, sec. 8, cl. 11, but also suggests that several centuries of congressional participation in initiating war--including the declarations of war in the War of 1812 and the two world wars, the authorizing statutes in the two Gulf Wars, the Korean War, the Indochina conflict, and after September 11-- were all constitutionally unnecessary.

Mr. Gonzales' own brief statements have also urged a broad view of the president's constitutional powers to conduct the "war on terror." In claims that have now been largely rejected by the United States Supreme Court, he has asserted the President's broad power as Commander-in-Chief to label detainees as enemy

combatants and to detain them indefinitely and incommunicado without judicial oversight or express congressional authorization. In a speech before the American Bar Association's Standing Committee on Law and National Security, Mr. Gonzales suggested that when detaining so-called "enemy combatants," "there is no rigid process for making such determinations -and certainly no particular mechanism required by law. Rather, these are the steps that we have taken in our discretion." Later in the same address, he suggested that in such actions, the President was constrained less by the rule of law than "as a matter of prudence and policy."

The Attorney General has a duty not just to serve his client, but more fundamentally to support, protect, and defend the Constitution's commitment to a system of checks and balances. Mr. Gonzales should clarify his views regarding the appropriate balance among executive, judicial and congressional authority to conduct a "war against terrorism" and what limits the Constitution places upon the scope of the President's power to authorize torture and cruel, inhuman, and degrading treatment.

III. The Applicability of the Geneva Conventions

Far from being outmoded, the Geneva Conventions of 1949, which the United States has ratified, set forth the international humanitarian law war applicable to all international armed conflicts. In particular, the Third and Fourth Conventions specify terms of detention for prisoners of war and civilians in such conflicts. Mr. Gonzales' January 25, 2002 Memorandum to the President correctly notes, at 2: "Since the Geneva Conventions were concluded in 1949, the United States has never denied their applicability to either U.S. or opposing forces engaged in armed conflict, despite several opportunities to do so." Yet as Counsel to the President, Mr. Gonzales found that the war on terror presents a "new paradigm [that] renders obsolete Geneva's strict limitations on questioning of enemy prisoners." In the same opinion, he rejected the views of the Secretary of State and concluded instead that the United States is not bound by its obligations under the Geneva Conventions in the conflict in Afghanistan.

Unsuccessfully urging that this policy be reconsidered, Secretary of State Colin Powell argued that:

It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the rule of law for our troops, both in this specific conduct and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain.

State Department Legal Adviser William H. Taft IV echoed Secretary Powell's protest, noting that Mr. Gonzales' decision "deprives our troops [in Afghanistan] of any claim to the protection of the Conventions in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts." By contrast, a decision that the Geneva Conventions did apply to the conflict in Afghanistan would have been consistent with the plain language of the treaties, the unbroken practice of the United States over the prior half-century, the practice of every other known party to the Conventions, and the express terms of the U.N. Security Council Resolution authorizing the intervention in Afghanistan.

The Administration could have conducted case-by-case status review hearings as required by Article 5 of the Geneva Conventions, to determine whether POW status might be appropriate in some cases. Instead Mr. Gonzales urged a blanket exclusion of the Afghanistan conflict from the operation of the Convention. Under this reasoning, Taliban fighters, who were acting as the armed forces of Afghanistan at the time, had no legal entitlement even to the humane treatment mandated by the Conventions. Yet if this were true, the same treatment would arguably apply to American soldiers sent to the Afghan war.

Ironically, Mr. Gonzales' own memorandum correctly identified, but then rejected, the major problems created by his own legal determination:

? "The United States could not invoke the GPW [the Geneva Conventions] if enemy forces threatened to mistreat or mistreated U.S. or coalition forces captured during operations in Afghanistan, or if they denied Red Cross access or other POW privileges

? Our position would likely provoke widespread condemnation among our allies and in some domestic quarters, even if we make clear that we will comply with the core humanitarian principles of the treaty as a matter of policy.

? Concluding that the Geneva Convention does not apply may encourage other countries to look for technical 'loopholes' in future conflicts to conclude that they are not bound by GPW either.

? Other countries may be less inclined to turn over terrorists or provide legal assistance to us if we do not recognize a legal obligation to comply with the GPW.

? A determination that GPW does not apply to al Qaeda and the Taliban could undermine U.S. military culture which emphasize maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries." January 25, 2002 Memorandum at 2.

In February 2002, the President directed United States Armed Forces to continue to treat all detainees humanely, and to the extent appropriate and consistent with military necessity, in "a manner consistent with the principles of [the] Geneva Conventions." But prisoner abuse at Abu Ghraib and reports of mistreatment on Guantanamo and elsewhere raise serious doubts as to whether this exhortation has been effective. Nor did the February 2002 directive specifically order civilian personnel in the intelligence services or civilian contractors to desist from coercive interrogation or cruel, inhuman and degrading treatment. Even apart from the Geneva Convention, the United States has a separate treaty obligation, under Article 16 of the Convention Against Torture, "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment which do not amount to torture as defined in Article I of the Convention, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." (emphasis added).

Since the onset of the war in Iraq in March 2003, the Administration has conceded that the Geneva Conventions apply to that conflict, but more than a year after the invasion, Mr. Gonzales requested from the Justice Department's Office of Legal Counsel an opinion regarding Article 49 of the Fourth Geneva Convention. That provision unequivocally states that "[i]ndividual or mass forcible transfers of protected persons [e.g. noncombatant civilians] from occupied territory ... are prohibited, regardless of their motive." (emphasis added) Yet in response, OLC provided a draft opinion asserting that Article 49 does not prohibit temporary relocation of "protected persons" "for a brief but not indefinite period, to facilitate interrogation."

Taken together, Mr. Gonzales' legal positions have sent a confusing message to the world about our Nation's commitment to human rights and the rule of law.

They have fostered a sense that we apply double standards and tolerate a gap between our rhetoric and our practice. Obviously, our country has faced a dangerous threat since September 11, and we expect our leading officials to respond. But we should not discount the enormous costs to our reputation as a leader on human rights and the rule of law from the perception that we have waged a war on terror by skirting the Torture Convention, upsetting constitutional checks and balances, opening loopholes in the Geneva Conventions, and creating extra-legal persons and extra-legal zones.

The Attorney General of the United States must ensure that no person is above the law, and that no person is outside the law. I urge you to closely examine Mr. Gonzales' views on these matters and to give very careful consideration to his record and his current legal opinions. His willingness to commit to renouncing torture and cruel treatment as instruments of U.S. policy, to preserving the constitutional system of checks and balances and to ensuring strict U.S. observance of the Geneva Conventions should be key factors in evaluating his fitness to serve as our nation's highest law enforcement officer.

Thank you. I now stand ready to answer any questions the Committee may have.

Appendix

Harold Hongju Koh is Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, where he has taught since 1985, and has served as the fifteenth Dean since July, 2004. A Korean-American, Professor Koh and his family moved to New Haven in 1961. From 1998 to 2001, he served as Assistant Secretary of State for Democracy, Human Rights and Labor. He teaches international law, the law of U.S. foreign relations, international human rights, international organizations and international regimes, international business transactions, international trade and civil procedure. A graduate of Harvard College 1975 (summa cum laude in Government), Magdalen College, Oxford 1977 (Marshall Scholar and First Class Honours in Philosophy, Politics and Economics), and Harvard Law School 1980 (cum laude Developments Editor of the Harvard Law Review), Professor Koh went on to serve as law clerk to Judge Malcolm Richard Wilkey of the D.C. Circuit (1980-81), and Justice Harry A. Blackmun of the U.S. Supreme Court (1981-82). Before coming to Yale, he practiced law at the Washington D.C. law firm of Covington and Burling (1982-83) and at the Office of Legal Counsel at the U.S. Department of Justice (1983-85). He has written more than 80 articles and authored or co-authored eight books, including Foundations of International Law and Politics (2004 Foundation with O. Hathaway); The Human Rights of Persons with Intellectual Disabilities: Different But Equal (2003 Oxford with S. Herr & L. Gostin);

Transnational Business Problems (2003 Foundation with D. Vagts and W. Dodge); The Justice Harry A. Blackmun Supreme Court Oral History Project (released 2004); Deliberative Democracy and Human Rights (1999 Yale with R. Slye), International Business Transactions in United States Courts (Hague Academy of International Law 1996); Transnational Legal Problems (2d ed. 1994 Foundation with H. Steiner & D. Vagts) and The National Security Constitution (Yale 1990), which won the American Political Science Association's award as best book on the American Presidency.

Dean Koh is a Fellow of the American Academy of Arts and Sciences, an Honorary Fellow of Magdalen College, Oxford (where he was 1997 Waynflete Lecturer), and has been a Visiting Fellow at All Souls College, Oxford. He is an Overseer of Harvard University and a member of the American Law Institute. He has served as an Editor of the American Journal of International Law and the Foundation Press Casebook Series. He has received Guggenheim and Century Foundation Fellowships and has been awarded seven honorary doctorates and law school medals from the Villanova Law School and Touro Law School. He sits on the boards of directors of the National Democratic Institute, Human Rights First, and Human Rights in China and has received more than twenty awards for his human rights work. He has given several dozen named lectures and received the 2003 Wolfgang Friedmann Award from Columbia Law School for outstanding work in International Law. He was named by American Lawyer magazine as one of America's 45 leading public sector lawyers under the age of 45, and by A Magazine as one of the 100 most influential Asian-Americans of the 1990s. He lives in New Haven with his wife, Mary-Christy Fisher, a legal services attorney, and their children Emily (18) and William (14). For a fuller curriculum vitae, see <http://www.law.yale.edu/outside/html/faculty/hkoh/profile.htm>.